TWIN POLICIES: DIFFERENT "PARENTS" –THE CASE OF ETHNIC "PREFERENCES" IN GOVERNMENT PROCUREMENT

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ABSTRACT. Do state and local governments have to justify preferences in procurement? The U.S. Supreme Court in its landmark 1989 decision, City of Richmond v. Croson said yes. The federal system has a different system of founding, reporting and justification. Federal government rules do not equal state/local government rules. State/local agencies must do disparity study prior to establishing preferences.

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For those working in federal procurement since the Competition in Contracting Act (CICA), circa 1984; the existence of preference programs, particularly around ethnicity, have been a "given." Let's consider a different environment, namely the context of state and local governments. Should these entities follow the same rules as the federal mandates? This question has been tried, challenged and appealed up to the Supreme Court for judicial ruling.

At the basis of the policy-making foundation theory is the concept of "founding theory". This suggests that the origins of the establishment of the organization bear primary interpretation of what is legitimate and what is not. (In social science terms, the concept of "framing" is similar in terms of setting an environment or tone for introducing a person or idea) As it turns out, ethnic preferences in the federal system are legislated by U.S. Congress, and thereby legitimized. However, state and local governments make policies for their jurisdiction unique to their governing body officials. Thereby, the Supreme Court has ruled that something called "a disparity study" must be conducted (and updated periodically) to justify the imposition of ethnic preferences in each unique jurisdiction.

Federal System – The Federal Acquisition Regulation (FAR)

According the FAR Part 19, Socio-economic programs, the regulation spells out the various ethnic groups, and the 8(a) programs for minority disadvantaged groups. This includes preferences in "full and open competitions" and set-asides for competition only among the 8(a) programs. There is also a requirement that 8(a) groups be certified through the U.S. Small Business Program. Moreover, there are requirements for ownership that the business must be owned by 51% or more by a person in the minority ethnic category. Also, there are certain requirements about the amount that can be subcontracted when a contract award has been made. However, there are no requirements for ethnic composition of the workforce that is employed to actually conduct the business. (It is not unusual to see Caucasians or other nationalities that one meets at contractor meetings to be employed by an 8(a) business.

Moreover, there are monetary thresholds that may prohibit a small disadvantaged business owner from being certified by the U.S. S.B.A. These rules restrict the amount of savings that a prospective 8(a) client may have in savings in advance of applying for the designation.

Origins of FAR Rules

The FAR updates are written by the FAR Council composed of members from NASA, DOD and GSA. Prior to policy issues, the notices may be placed in the Federal Register. Policy initiatives for changes stem from the Office of Federal Procurement Policy (OFPP), an executive branch office affiliated with the New Executive Office Building located directly across from the Old Executive Office Building next to the White House in Washington, D.C. By publishing notices in the Federal Register, the public is allowed to comment upon proposed policy changes before policies are implemented by the OFPP which then feeds into the FAR Council writing of "Updates" issued frequently to the FAR. The origin of OFPP initiative may come from legislative input, executive input or study groups assigned by industry/governmental committees. An example of this would be the "Performance Based Contracting Pilot Studies of the early 1990's." As a result of analyzing the results of the pilot studies, policies were initiated that found their way into the FAR for government wide compliance.

Role of the Legislature

The U.S. Congress is a major player in the federal procurement system: for example, when the U.S. legislature undertook the "Contract with America" in the 1990's under then Speaker Newt Gingrich, a concurrent program - the "National Performance Review" managed by Vice-President Al Gore was also underway. Procurement in the federal government was one of main targets of the legislative reform. As a result, a slew of legislation followed. There was the Federal Acquisition Reform Act I and II, Federal Acquisition Streamlining Act I and II, the Clinger Cohen Act (aka Information Technology Management Reform Act (ITMRA)), and the FAIR Act (Federal Activities Inventory Reform Act). While a paper

could be written just on the legislation that came out of the 1990's as a result of the partnership between the first ever Republican Congress and President William Clinton, that will not be the focus of this paper. (Note 1)(Note 2).

Moreover, every year, the Executive Branch prepares reports from each Agency about the expenditure of taxpayer monies in terms of contracts awards. These reports are aggregated data from the Federal Procurement Data System (aka FPDS). After each and every contract award, a form must be recorded for the FPDS. The form requires information about several aspects of the contract award, including dollar value spent, small or large business, 8(a) or other preference program (such as service disabled veterans owned small business (SDVOSB) or veteran owned small business (VOSB) or woman owned small business (WOSB). There is other information recorded on the FPDS form such as technology or service, branch, amount of dollars saved, green procurements awarded, and so on. Every year, Congress receives the reports on procurement dollars expended and the categories it includes, broken down for key variables.

In summary, Congress can legislate changes to the federal procurement system or changes to procurement can originate in the executive branch from the Office of Federal Procurement Policy (OFPP).

Part II: The Other "Twin": State and Local Governments Procurement Policy

When state and local governments make procurement policy, no doubt that influences such as federal procurement policy should influence their decision-making. It may appear logical to apply a similar policy of ethnic preferences in procurement since the federal system requires it. However, that is until a level-headed Caucasian contractor protests the requirement of mandatory subcontracting award percentages to a minority business. In this case, the Caucasian contractor correctly challenged the procurement office and

management of the Washington Suburban Sanitary Commission of a "preferential award rating" to a Minority Business Enterprise (MBE). Specifically, the contractor wished to clarify the legitimate authority of WSSC in applying ethnic preferences for a portion of a contract award by way of a subcontract to a minority business. The bottom line is that the procurement policy rules for State and Local government originate from a different set of governing rules and thereby answer to a different "parent". The U.S. Congress and OFPP are not the decision makers in this case to guide the regulations for State and Local Governments. State and local governments do not follow the FAR, and it does not apply to them. State and local governments follow municipal law, state law and the Uniform Commercial Code (UCC), and of course, rulings by the U.S. Supreme Court. While State and local governments must follow federal law, they are not bound by the CFR (Code of Federal Regulations) or FAR (part of the CFR for federal administration of procurement). Folks, we are talking about an entirely different animal. And the basis for this difference may be explained by "founding theory" or "framing", if you prefer, from the social science context. The context of development of the MBE programs in state and local government can be best explained by the theory of "organizational development."

State and Local Procurement Preferences: Case Study of Washington Suburban Sanitary Commission (WSSC)

BACKGROUND

Since the late 1970's, the WSSC established its MBE (Minority Business Enterprise) programs in an effort to include historically underutilized business groups (Note 3: After the great race riots in the 1960's in the District of Columbia, many changes were made, including affirmative action in employment). The MBE program had four areas of preference programs:

"This program consisted of four areas: construction, architectural and engineering (A/E), professional services, and procurement. In construction, for example, the following mandatory subcontracting requirements for minorities were practiced.

(1) For construction projects valued at greater than $75,000, mandatory subcontracting to minorities was set at 5 percent;

(2) For construction projects valued between $100,000 and $200,000, mandatory subcontracting was set at 10 percent;

(3) For construction projects valued at greater than $200,000, mandatory subcontracting was set at 15 percent; and,

(4) For those contracts valued less than $75,000, there was no mandatory subcontracting."

(Policies and Procedures, WSSC, 1998)

Challenge Case

Over the years, the WSSC had modified its rules and programs to comply with various court rulings. However, in the early 1990's the WSSC had a direct challenge from a paving company that balked at the ruling for mandatory subcontracting of a percentage of its contract award to a minority subcontractor. In response, the WSSC suspended its MBE programs Subsequently, the WSSC worked with the Maryland legislature, and the State legislature passed a ruling that legitimized the WSSC MBE programs.

Round Two

In 1995, the WSSC received its second major attack. This time from the Public Works Contractors Association of Maryland (PWCA) who claimed that the WSSC did not have a constitutional ground or legal merit to impose its MBE program. The WSSC responded by suspending its MBE program for construction.

Compliance with Richmond v Croson

In 1989, the U.S. Supreme Court handed down the landmark decision of Richmond vs. Croson (488 v. 469) clarifying the rules by which a State and Local government may implement a minority preference program. At issue was "equal protection" as argued by a

non-minority contractor who was required by the city of Richmond to subcontract at least 30 percent of its contract award to minority-owned or minority controlled enterprises. The ruling is considered a "litmus test" for the rights of State and Local governments to impose ethnic preferences in contracting.

"The ruling required that where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. This means that jurisdictions must review their programs based on the strict scrutiny standard set by the court." (Retrieved from the world wide net on April 14, 2012 at publius.oxfordjournals.org/content/20/3/63.full.pdf)

According to the ruling, the state and local government must choose the least restrictive means to accomplish its purpose. Moreover, the policy must bear a logical link to the purpose at the State and Local level. Furthermore, the use of disparity study is seen as a method to justify preference programs at the State and Local level in contracting. Unduly onerous or restrictive procurement policies will be held in the future to the standards test of "equal protection." In the Richmond case, the Court found that there was not adequate evidence to justify the mandatory preferences in subcontracting. The disparity study is the means by which a State and Local government can provide current evidence of the state of its ethnic representation and a comparison to qualified businesses able to contract for work versus the amount of contract awards distributed among the regions various minority and majority contractors.

Theory of Organizational Development as it Applies

The website of consultants for organizational change (retrieved from the world wide web on January 1, 2012 at: www.amirror.com/.../**organizational-development**-a-alignment.html) corresponds to most organizational development approaches. Namely, for those bureaucracies who have grown out of touch with the modern environment and culture, there needs to be the

development and coaching of internal entrepreneurs. Moreover, these "change agents" need to be mentored to bring about a more robust organization. Organizations may need "revitalization" after "bureaucratization" and other standard operating procedures (SOP's) become obsolete or otherwise deaden innovative thinking or significant adaptation.

Moreover, during organizational development, there is bound to be culture clashes, and personality clashes among various members of the invested group. The purpose of the organizational development is to develop a new "structural flexibility" (retrieved from the world wide web on January 1, 2012 at: www.amirror.com/.../organizational-development-a-alignment.html) that revitalizes the organization. Especially in the case of mergers and acquisitions or other adaption situations, organizational development can turn around an organization to be more productive and in tune with current environment for sustaining the productivity of the group.

If we follow the steps taken by the WSSC and State of Maryland government along with other local governments such as city of Richmond, one may see the process of introduction of new policies for "Minority Business Enterprises". These policies were introduced as a form of organizational change and development to revitalize the community and promote the participation of new business groups in the community. The conflict of cultures is natural as some see a benefit in the new rules for MBE's while others see the detriment of the introduction of the policies for minority participation. The process is normal as organizations adapt to adjusting priorities. Stakeholders influencing the introduction of preferences in procurement must also adapt to an environment where previously there were none.

While we may never know exactly who the stakeholder (change agents) was that suggested the implementation of preferences in procurement around ethnic categories, we can conclude that the policies were pervasive in the Mid-Atlantic States. Examples would be the State of Maryland, WSSC in Laurel, MD, and City of Richmond, to name a few.

CONCLUSION/SUMMARY

After the landmark Richmond v. Croson decision by the Supreme Court, state and local governments are adhering to the practice of performing "disparity studies" in their jurisdiction to justify any ethnic preferences in contracting or subcontracting requirements. These must be updated periodically and are performed by consultants for a significant cost to the government agency. Anecdotally, the WSSC paid $200,000 for a contractor to perform a disparity study of their jurisdiction which includes Montgomery County. While founding theory explains the different rules and compliances that state and local governments must follow with regards to ethnic preferences, organizational development theory explains how the changes in policy at the state and local government came about.

SUGGESTIONS FOR FUTURE RESEARCH

It has been brought to the author's attention that certain jurisdictions in the State of Florida, for one, have not yet "come of age" with regards to the conduct of a "disparity study" to justify ethnic preferences in state and local contracting. If one were to speculate, it would seem that many other jurisdictions, not close to major governmental centers like Washington, D.C. may also be guilty of the same failing. If some data-crunching, qualified analytical policy researcher were to develop a firm in the business of performing "disparity studies" as required by the U.S. Supreme Court, it would be a service to state and local government arena, provided the charge for such a study would be reasonable. This concept seems particularly appropriate since the Census was conducted fairly recently.

Also, perhaps more emphasis should be applied to the enforcement of the 1989 Richmond v. Croson rules handed down by the U.S. Supreme Court to ensure compliance of other state and local governments and their procurement policies with regards to the contracting community.

NOTES

Note 1: It does suffice to say that the federal budget was significantly trimmed, and for the first time the U.S. budget posted a surplus. However, this went away when George W. Bush became president and decided to return the surplus to the people in the form of $300 checks to every tax payer. I find it interesting that as a resident of South Florida, that I would receive a letter from Senator Marco Rubio, with a quote on the cover of the letter about concern for paying our "deficit". I want to say – why did the Republicans let former president George Bush give away the surplus former president William Clinton had achieved?

Note 2: Even though the U.S. budget was considered a "surplus" due to federal accounting purposes, the U.S. was still in debt and paying interest on the debt in an accounting system that most Americans would understand if they were balancing their ledgers).

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